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IN THE

Supreme Court of the United States

October Term, 1965

No. [redacted] 311

EDWARD POOL,

Petitioner,

vs.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circut.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circut.

Petitioner, Edward Pool, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming the judgment of the United States District Court for the Southern District of California, wherein the petitioner was sentenced to an aggregate of ten years imprisonment, after a trial without a jury.

Opinions Below.

The opinion of the circuit court is appended hereto as Appendix "A," and is also found in the Clerk's record of the circuit court; but the opinion below is not as yet reported. The judgment of the court below is appended hereto as Appendix "B".

A petition for rehearing was duly and timely made and denied on the 1st day of June, 1965. A copy of the order denying said petition for rehearing is appended hereto as Appendix "C".

Grounds on Which the Jurisdiction of This Court Is Invoked.

The date of the judgment sought to be reviewed and the time of its entry is May 27, 1964. The date of the judgment of the circuit court affirming the judgment of the trial court is April 16, 1965. The petition for rehearing timely filed was denied by the court on June 1, 1965.

The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254(1).

Statement of the Case.

A four-count indictment was filed charging the defendant, Edward Pool, with violating Section 174, Title 21, U.S.C., said violation occurring on the 17th day of January, 1964 [C. T. pp. 2-5].[1]

On May 26, 1964, the defendant appeared with his counsel for trial before the Honorable Leon Yankwich, and the jury was thereupon selected.

On May 27, 1964, in the courtroom, when the defendant was present, the following colloquy took place between the Assistant United States Attorney Mr. Morrow and the attorney for the defendant, out of the presence of the jury:

> "Mr. Morrow: Your Honor, counsel for defendant approached me and would like to dispose of this case on a stipulated fact situation, and we

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[1]When the Clerk's Transcript is referred to herein the initials C. T. will be used, and in the case of reference to the Reporter's Transcript the initials R. T. will be used.

will work through the morning and try and have the final stipulation of fact to you by early this afternoon.

Mr. Ingber: It would be the desire of the defendant at this time to waive his right to trial by jury and to submit the matter to the court upon a stipulated set of facts, as the representative of the Government has indicated.

Mr. Morrow: Your Honor, the Government will not consent to the waiver of the jury until the stipulation is drafted and signed.

Mr. Ingber: At which point the waiver will then be effective. I merely want to indicate to the court that the jury perhaps need not be immediately tied up certainly for this morning.

The Court: Will 2:00 o'clock be enough time?

Mr. Ingber: I hope so.

The Court: Well, we can excuse the jury and tell them they are excused and to come back at 2:00 o'clock." [R. T. p. 97, lines 2-22].

Prior to 2:00 p.m. on May 27, 1964, a written stipulation of facts, prepared and signed by both counsel and the defendant, was filed with the clerk, and the same was submitted to the court. The court, having read the stipulation of facts so submitted, found the defendant guilty on all four counts [R. T. pp. 99, 100].

The defendant was then, on said May 27, 1964, sentenced in such a manner that a maximum of ten years was required to be served by him [R. T. p. 111].

A notice of appeal was filed on June 3, 1964, after a new trial was denied; and the court set bond on appeal at $25,000 [C. T. p. 18].

The petitioner has complied with the Federal Rules of Criminal Procedure and all others appropriate to presenting his case before this Court.

Statutes and Constitutional Provisions Involved.

The constitutional provisions involved are Article III, Section 2, clause 3, and the Sixth Amendment of the United States Constitution.

The statutes involved are Sections 173 and 174, Title 21, U.S.C., and Rule 23(a) of the Federal Rules of Criminal Procedure, Title 18, U.S.C.

Rule 23(a) of the Federal Rules of Criminal Procedure provides as follows:

> "(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

The above constitutional provisions and the statutes involved are set forth in Appendix "D."

Question Presented for Review.

There Was No Valid Waiver of a Jury Trial, Due to Noncompliance With Rule 23(a) of the Federal Rules of Criminal Procedure, 18 U.S.C.

The crux of the question presented to this Court is contained in connection with the discussion between counsel in the court on Mary 27, 1964, as set forth in the Reporter's Transcript [p. 97, lines 2-22] and as hereinbefore set forth, wherein the defendant's attorney stated that the defendant wished to waive his right to trial by jury and submit the matter to the court upon a stipulated set of facts and the Assistant United States

Attorney stated he would not consent to the waiver of the jury until the stipulation was drafted and signed—to which counsel for the defendant stated that the waiver would then be effective.

The stipulation was prepared and signed by both counsel and by the defendant, but such stipulation did not mention the waiver of a jury trial and there was no independent written waiver of a jury trial at any time during the proceedings. Nevertheless, the jury was discharged and the court rendered a judgment of guilty on the basis of the stipulated facts.

On the motion for new trial made before the trial court [C. T. pp. 19, 20] and on appeal to the Ninth Circuit, the same issue was raised, and this issue was resolved against the petitioner herein.

Reasons for Granting the Writ.

While this Court has ruled that a jury trial may be waived by the defendant provided the waiver is made with the express and intelligent consent of the defendant, the consent of government counsel and the sanction of the court (*Patton v. United States,* 281 U.S. 276, 312), it has never passed upon the question of whether or not a waiver of a jury trial made by oral stipulation in court is sufficient or whether Rule 23(a) of the Federal Rules of Criminal Procedure, Title 18, U.S.C., should be strictly followed. This is an important question of law and should be determined by this Court for the guidance of the district and circuit courts in future cases.

ARGUMENT.

I.

There Was No Valid Waiver of a Jury Trial, Due to Noncompliance With Rule 23(a) of the Federal Rules of Criminal Procedure, 18 U.S.C.

In the instant case, while there was a statement by the counsel for the defendant that the defendant desired to waive a jury trial and present the defendant's case on a stipulation of facts, the Assistant United States Attorney stated he would not consent to the waiver of a jury until the stipulation was drafted and signed [R. T. p. 97]. The stipulation of facts was signed and filed but there was no further proceeding with respect to the waiver of a jury trial, except the discharging of the jury. There was neither a written stipulation signed by the defendant nor was there a stipulation in open court following the filing of the stipulation of facts that the jury was in fact to be waived. There was no mention whatsoever in the stipulation of facts that the defendant waived the jury trial. In order to comply with Rule 23(a) of the Federal Rules of Criminal Procedure, there should have been a waiver of a jury trial included in the stipulation of facts or in a separate written document executed prior to the discharge of the jury.

Subdivision (a) of Rule 23 provides as follows:

> "Cases required to be tried by jury *shall be so tried unless the defendant waives a jury trial in writing* with the approval of the court and the consent of the government." (Emphasis ours.)

It will be noted that the word "shall" is used with respect to the waiver in writing, whereas in subdivision (b) of Rule 23 the language is entirely different, to wit:

> "Juries shall be of 12 but at any time before verdict *the parties may stipulate in writing* with the approval of the court that the jury shall consist of any number less than 12." (Emphasis ours.)

From the reading of the above section it is obvious that Congress intended that the first subdivision of Rule 23 should be mandatory with respect to the requirement of a written waiver, whereas in subdivision (b)—with respect to a jury of less than 12—the provision with respect to the waiver was permissive. In other words, the implication under subdivision (b) is that the waiving of 12 jurors might be in writing or might be in some other manner.

Undoubtedly, Rule 23 was passed as a result of the ruling in the case of *Patton v. United States, supra,* 281 U.S. 276, 312-313, wherein this Court stated:

> "In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. That, perhaps, sufficiently appears already. Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases, the value and appropriateness of jury trial have been established by long experience and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such impor-

> tance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

However, the fact that the language of the two subdivisions of Rule 23 is so different indicates that Congress had a different intent in mind with respect to the waivers. If it had not intended that the waiver of a jury trial should be handled differently from the waiver of a full jury of twelve, it would not have used the word "shall," indicating that the written waiver was mandatory.

In Webster's New Collegiate Dictionary the definition of "shall" is as follows:

> "Used to express a command or exhortation—Used in law, regulations, or directives to express what is mandatory."

In the case of *Horne v. United States,* 264 F. 2d 40, the parties stipulated in open court that if one juror became incapacitated, the trial could proceed with eleven jurors. There was no written stipulation, and when one of the jurors became incapacitated, the case

proceeded with eleven jurors. The court commented on the difference in the wording of subdivisions (a) and (b) of Rule 23 but stated that in the particular case, subdivision (a) was not involved. And with respect to whether or not subdivision (b) was not complied with, the court stated on page 41:

> "The failure to record the agreement in the form of a written stipulation as Rule 23(b) requires is not here decisive. This is a collateral proceeding in which errors in procedure on the initial trial of the case are not open for review."

In that case, the issue was raised in a collateral proceeding on an attempt to vacate the judgment, whereas in the instant case it is a matter of procedure raised on a direct appeal.

The circuit court stated that there was written evidence of the intent to waive a jury, by reason of the stipulation of facts, and that it should look beyond the form to the substance. The court stated:

> "Appellant does not now and has never urged either that he failed to consent, or that his consent was not freely and intelligently exercised. He urges, *at most*, a technical non-compliance. This, *at most*, is harmless error or *damnum absque injuria*."

In other words, the court took the position that it could ignore the mandatory provision of subdivision (a) of Rule 23 because of a technicality. This same argument, in a sense, was raised in the case of *Patton v. United States, supra*, 281 U.S. 276, where it was argued by

the government that trying the case with eleven instead of twelve jurors constituted but a slight infraction of the constitutional provision for a jury trial. This Court, however, stated on page 292:

> "But the constitutional question cannot be thus settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with more serious infractions which might be conceived. To uphold the voluntary reduction of a jury from twelve to eleven upon the ground that the reduction—though it destroys the jury of the Constitution—is only a slight reduction, is not to interpret that instrument but to disregard it. It is not our province to measure the extent to which the Constitution has been contravened and to ignore the violation, if, in our opinion, it is not, relatively, as bad as it might have been."

The same argument might be applied to the reasoning of the circuit court in the instant case, because, in effect, it stated that if there was an intent to waive the jury then the failure to comply with subdivision (a) of Rule 23 was to be disregarded. Such a view would emasculate, vitiate and nullify completely the language of subdivision (a), and the requirement that the waiver of a jury trial *must* be in writing becomes wholly null and void. Either such a requirement must be strictly complied with or the statute becomes a dead letter.

In order to settle this important question and to determine for the guidance of the United States District Courts and Circuit Courts of Appeals in future cases, this Court should rule upon the issue herein presented.

Conclusion.

For the foregoing reasons, we respectfully submit that this petition for certiorari should be granted and that the judgment of the circuit court and of the district court be reversed.

Respectfully submitted,

RUSSELL E. PARSONS,
Attorney for Petitioner, Edward Pool.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Edward Pool, Appellant, vs. United States of America, Appellee. No. 19,522.

[April 16, 1965]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes, Duniway and Ely, Circuit Judges.

Barnes, Circuit Judge:

Appellant commenced his trial before a jury on four counts, two charging the concealment and two charging sale of two amounts of heroin. (21 U.S.C. § 174.) During this jury trial, the parties signed a stipulation of facts, and the case was thereafter tried by the judge. Appellant was found guilty on each count, and sentenced to ten years—five years on each count, counts three and four to run consecutively with one and two, respectively.

Two errors are alleged:

(1) There was no *valid* waiver of jury as required by Rule 23(a).

(2) The statutory presumption of § 174 created by proof of possession of heroin is unconstitutional.

The discussion in chambers, which led up to the stipulation, was outside of the jury's presence; was between, and in the presence of, the judge, and the prosecutor, the defense counsel, and the defendant.

Counsel for defendant said:

"It would be the desire of the defendant at this time to waive his right to trial by jury and to submit the matter on a stipulated set of facts. . . ."

Government counsel:

"Your Honor, the Government will not consent to the waiver of the jury until the stipulation is drafted and signed."

Counsel for defendant:

"At which point the waiver will then be effective. . . ." (R. T. 97)

Appellant heard this. His counsel said it in his presence. Thereafter both appellant and his counsel signed the stipulation. Appellant's act of placing his own signature on the stipulation of fact under the circumstances here present constituted a written manifestation of his intent to waive his right to a jury trial. It was not on or in the usual form, but the consent was fully evident in writing.

As government counsel states, such an interpretation fulfills not only the spirit of Rule 23(a) in guaranteeing a free and intelligent waiver, but also fulfills the letter of the rule by providing written evidence of that intent. In protecting any defendant's constitutional rights we do, and should, look beyond form to substance. We should do no less in protecting the public's rights.

Appellant does not now and has never urged either that he failed to consent, or that his consent was not freely and intelligently exercised. He urges, *at most,* a technical non-compliance. This, *at most,* is harmless error or *damnum absque injuria.*

The concern of society in creating the rule is to insure a greater probability of a defendant understanding what he is doing, if and when he waives his right to trial by jury, by requiring it to be in writing. *Patton v. United States,* 281 U.S. 276 (1930); *Horne v. United States,* 264 F.2d 40 (5th Cir.), *cert. den.* 360 U.S. 934 (1959).

We hold there was a written waiver.

Appellant's second alleged error of insufficiency of the evidence is based on the validity of the statutory presumption contained in 21 U.S.C. § 174. We have repeatedly followed the Supreme Court in holding it constitutional, particularly with respect to opium derivatives. *Yee Hem v. United States,* 268 U.S. 178 (1925); *Agobian v. United States,* 323 F.2d 693 (9th Cir. 1963), *cert. den.* 375 U.S. 985 (1964); *Cellino v. United States,* 276 F.2d 941 (9th Cir. 1960).

Additionally, in the stipulation of facts it is stipulated the appellant was asked if he got these particular narcotics in Mexico, and he answered that he had. There thus was evidence, which if believed, made reliance on the presumption unnecessary.

Affirmed.

APPENDIX "B."

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Edward Pool, Appellant, vs. United States of America. Appellee. No. 19,522.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 16, 1965

APPENDIX "C."

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Tuesday, June 1, 1965.

Before: Barnes, Duniway, and Ely, Circuit Judges.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant filed May 14, 1965, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX "D."

Constitutional Provisions and Statutes Involved.

Article III, Section 2, clause 3, United States Constitution

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when crimes be not committed within any state the trial shall be at such place or places as the Congress may by law have directed.

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; * * *

Rule 23(a), Federal Rules of Criminal Procedure, 18 U.S.C.

> (a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

21 U.S.C. 173

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be im-

ported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

* * *

21 U.S.C. 174

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.